UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

LAGUARDIA ASSOCIATES, LLP d/b/a
CROWNE PLAZA LAGUARDIA AIRPORT
Employer

and Case No. 29-RC-10192

NEW YORK HOTEL AND MOTEL TRADES
COUNCIL, AFL-CIO
Intervenor

REPORT ON OBJECTIONS AND NOTICE OF HEARING

On April 6, 2004,[1] Local 108, Retail, Wholesale, Department Store Union, United Food and Commercial Workers Union, AFL-CIO, herein called the Petitioner, filed a petition in the above-captioned matter seeking to represent certain employees employed by Crowne Plaza Hotel, herein called the Employer. Thereafter, on or about April 13, 2004, New York Hotel and Motel Trades Council, AFL-CIO, herein called the Intervenor, or Union, intervened in the proceedings by presenting a showing of interest.

On April 15, the undersigned approved a Stipulated Election Agreement executed by the Employer, the Petitioner and the Intervenor. On May 4, 2004, the undersigned granted the Petitioner's request to withdraw from the ballot, and ordered that the election be conducted according to the terms of the Stipulated Election Agreement, with the Intervenor alone on the ballot. The May 4 Order is attached hereto as Exhibit 1. Pursuant to the Stipulated Election Agreement, an election by secret ballot was conducted on May 13, among the employees in the following unit:

> All full-time and regular part-time engineering, housekeeping, banquet, front desk, kitchen, restaurant, health club, lounge, and PBX

[1] All dates hereinafter are in 2004 unless otherwise indicated.

employees, employed by the Employer at its facility located at 104-04 Ditmars Boulevard, East Elmhurst, New York, but excluding all accounting and human resources department employees, office clerical employees, guards, managers, and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots made available to the parties at the conclusion of the election pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	145
Number of void ballots	0
Number of ballots cast for the Intervenor[2]	101
Number of votes cast against participating labor organization	38
Number of valid votes counted	139
Number of challenged ballots	4
Number of valid votes counted plus challenged ballots	143

Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted plus challenged ballots has been cast for the Intervenor.

Thereafter, on May 20, the Employer filed timely objections to conduct affecting the results of the election. The Employer's objections are attached hereto as Exhibit 2.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-mentioned Employer's objections, during which the parties were afforded full opportunity to submit evidence bearing on the issues. In support of its objections, the Employer, by its attorney, David I. Rosen, Esq., of Littler Mendelson, PC, provided a written offer of proof summarizing the testimony of its prospective witnesses, supplemented by a number of electronic mail messages. The Union, by its General Counsel, Richard Maroko, Esq., furnished a written response to the Employer's objections, generally denying the allegations. After the

[2] The tally of ballots is hereby amended to reflect the fact that the Intervenor, not the Petitioner, received 101 votes as set forth above.

Employer provided its offer of proof, Mr. Maroko was asked to provide more specific responses to several of the allegations. A written response was provided by Jane Lauer Barker, Esq., of Pryor Cashman Sherman & Flynn LLP. The investigation revealed the following:

The Employer, a domestic limited liability partnership registered under the laws of the State of New York, with its principal office and place of business located at 104-04 Ditmars Boulevard, East Elmhurst, New York, is engaged in the operation of a hotel. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of $500,000, and purchased goods valued in excess of $50,000 from points located outside the State of New York. The Employer is engaged in commerce within the meaning of the Act.

INTRODUCTION

A Board election "cannot stand whenever conduct disruptive or destructive of the exercise of free choice by the voters occurs, regardless of whether the person responsible for the misconduct is an agent of a party to the election or simply an employee." *Westwood Horizons Hotel*, 270 NLRB 802, 804 (1984). However, "it is not enough for the objecting party's evidence merely to imply or suggest that some form of prohibited conduct has occurred," *Cumberland Nursing & Convalescent Center*, 248 NLRB 322, 323 (1980), and the existence of a procedural irregularity is not a sufficient basis for overturning an election. *Black Bull Carting Inc*., 29 F.3d 44, 46 (2d Cir. 1994)(citing *Mattison Machine Works*, 365 U.S. 123, 81 S.Ct. 434 (1961)(*per curiam*); *Polymers, Inc*., 414 F.2d 99 (2d Cir. 1969), *cert. den.*, 396 U.S. 1010, 90 S.Ct. 570 (1970)).

Rather, an objecting party "must present by "specific evidence…not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Tony Scott Trucking, Inc*., 821 F.2d 312, 316 (6th Cir. 1987)(per curiam)(quoting *Golden Age Beverage Co*., 415 F.2d 26, 30 (5th Cir. 1969), *cert. den*., 484 U.S. 896 (1987)). The test is an objective one, and "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." *Picoma Industries*, 296 NLRB 498, 499 (1989); *see Petrochem Insulation, Inc.*, 341 NLRB No. 60 (2004); *Culinary Foods, Inc*., 325 NLRB 664 (1998). In "making its determination as to whether the conduct has the tendency to interfere with employees' freedom of choice, the Board will consider, *inter alia*, the closeness of the election." *Cambridge Tool & Mfg. Co., Inc*., 316 NLRB 716 (1995)(citing *Hopkins Nursing Care Center*, 309 NLRB 958 (1992)); *see S.F.D.H. Associates, L.P. d/b/a Sir Francis Drake Hotel*, 330 NLRB No. 98 (2000)("Petitioners' large margin of victory" a factor in overruling objections).

When the person responsible for the conduct alleged to be objectionable is not an agent of a party to the election, "less weight is accorded to such conduct than to the conduct of the parties. In such circumstances, however, the Board has set aside elections where the conduct created a general atmosphere among the voting employees of confusion and fear of reprisal for failing to vote for or to support the Union." *Steak House Meat Company*, 206 NLRB 28 (1973). With respect to misconduct by an agent of a party, the Board evaluates whether the conduct has "the tendency to interfere with the employees' freedom of choice." *Taylor Wharton Division, Harsco Corporation*, 336 NLRB 157 (2001); *see Avis Rent-A-Car System, Inc*., 280 NLRB 580, 581 (1986). In making this

evaluation, the Board considers such factors as "the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit," and "the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct." *Harsco*, 336 NLRB at 158.

THE OBJECTIONS

Objections 1 and 2

In Objection 1, the Employer alleges that the Intervenor, by its authorized representatives, employees and/or supporters, created a general atmosphere of coercion, fear, intimidation and confusion during the critical period before the election which interfered with the employees' ability to exercise their free and uncoerced choice in the election and interfered with the conduct of the election. Objection 1 is divided into six sub-parts, as set forth below.

Objection 2 alleges that the conduct set forth in Objection 1 "constituted improper implied threats by authorized representatives, employees and/or supporters of the Union that employees would face reprisals by the Union, such as job loss, if they failed to vote 'Yes' on the day of the election."

Objection 1(i), (iii), and (iv)

In these interrelated allegations, the Employer contends that the Intervenor, by its authorized representatives, employees and/or supporters, pressured employees to wear, and to display, "union solidarity" cards and tee shirts while at work; told employees that if they did not wear the "union solidarity" cards, the Employer would fire them after the election; and told employees that the only way for them to be protected against unlawful retaliation was to wear the "union solidarity" cards.

The Employer did not submit evidence regarding the pressure to wear pro-union tee-shirts, alleged in Objection 1(i). However, one bargaining unit employee is prepared to testify regarding the remaining allegations of Objections 1(i), (iii), and (iv), pertaining to the "union solidarity cards" worn by some employees to outwardly manifest their support for the Intervenor. This witness would testify that about a week before the election, co-worker Brenda Taveras, who was soliciting on behalf of the Intervenor, told the witness that if she failed to get a "union solidarity" card from the Intervenor before the election, as a means of manifesting the Intervenor, "if it won the election, could not protect her." There is no evidence that the witness ever obtained a union solidarity card. The Employer has not supplied evidence that other employees were present during the conversation, or that the witness told other employees about the incident.

According to the Intervenor, Ms. Taveras would testify that she did not make the statement described above, but told other workers that, "as open Union supporters, they have some protection from retaliation under the law, and that by obtaining a union solidarity card and wearing it management will know that they are union supporters. Wearing a card, Ms. Tavaras told workers, is proof that you are a union supporter. At no time did Ms. Tavares state that the Union could not or would not protect workers who did not obtain union cards."

In support of this Objection, the Employer cites *Lyon's Restaurants*, 234 NLRB 178 (1978). In *Lyon's*, a union shop steward told two employees that if they did not join the union they would not work. As a result of these threats, the employees signed authorization cards and paid dues and initiation fees. *Lyon's*, 234 NLRB at 178. The Board found the union's conduct objectionable and invalidated the election:

> [These statements] were the catalyst which propelled the two employees to sign authorization cards for Petitioner. The statements made by Petitioner's representative were false and were related to the serious topic of the employees' job security. We note that the resultant signing of authorization cards and apparent support of Petitioner may well have given an impression of support to other employees during the election campaign…

Lyon's, 234 NLRB at 179.

In the instant case, although Taveras's statement could be interpreted as a threat, it could also be interpreted as a prediction, consistent with the explanation provided by the Intervenor. *See Chardan, Inc., d/b/a Perfect Art, 332 NLRB No. 78*, slip op. at 4 (2000)(quoting *Gissel Packing Co*., 395 U.S. 575, 618 n. 58 (1969))(distinguishing between a legitimate prophecy and a threat); *see also JTJ Trucking, Inc*., 313 NLRB 1240, 1240 n. 1 (1994) (union's representation that if it lost the election, the employees would not be covered under the union's health plan, was a truthful representation, not a threat). However, the determination whether Taveras's alleged statement was a threat or a prediction would necessarily depend on an assessment of the relative credibility of the parties' witnesses. If the Employer can credibly substantiate that Taveras's statement was a threat, and not merely a prediction, and that in combination with other misconduct, it materially affected the results of the election, such misconduct may warrant setting aside the election. Inasmuch as there are substantial and material issues, including issues of fact and credibility, that would be best resolved at a hearing, I direct that a hearing be held before a hearing officer concerning Objections 1(i), (iii), and (iv), except to the extent that Objection 1(i) alleges that the Intervenor pressured employees to wear pro-union tee-shirts. Further, I direct that a hearing be held before a hearing officer concerning Objection 2, to the extent that it refers to the conduct alleged in Objections (i), (iii), and (iv) (other than the conduct involving pro-union tee shirts).

Objection 1(ii)

In this objection, the Employer asserts that the Intervenor, by its authorized representatives, employees and/or supporters, promised "to waive initiation fees solely for those employees who signed union authorization cards and/or who wore, and displayed, "union solidarity" cards bearing their photographs."

One witness is prepared to testify that on an unspecified date, an unnamed employee, soliciting on behalf of the Intervenor, told the witness that if she failed to sign an authorization card before the election, and failed to obtain a union solidarity card from the Intervenor with her photograph on it, she would have to pay a $300 "fine" to the Petitioner if it won the election.[3] There is no evidence that this witness signed an authorization card or obtained a union solidarity card. The Employer has not supplied evidence that other employees were present during the conversation, or that the witness told other employees about the incident. There is no evidence that the unnamed employee, or other agents or supporters of the Intervenor, made similar statements to other employees.

In response to this allegation, the Intervenor maintained that at all meetings with employees, organizers Terri Harkin and Otoniel Figueroa informed workers that after the negotiation of a collective bargaining agreement, members of the Intervenor would have to pay an initiation fee of $100 and a strike and defense fund fee of $200. The Intervenor denied ever telling employees that the $300 amount was "a fine or that it was an amount that would be charged to employees who did not sign an authorization card or a union solidarity card." With respect to the specific allegation regarding the statement by an

[3] On June 1, the Employer was asked to provide the date of the incident, and the name of the pro-union employee who allegedly made this statement, but this information has not been provided.

unnamed employee on an unspecified date, the Intervenor asserted that it had no way of investigating the allegation without being provided the name of the employee alleged to have made the improper fee waiver offer, and/or the name of the employee to whom the improper fee waiver offer was made.

In support of this Objection, the Employer cites *Savair Mfg. Co*., 414 U.S. 270 (1973), and related cases. In *Savair*, union officials explained to employees at meetings that those who signed "recognition slips" would not be required to pay an initiation fee if the union won, while those who did not sign would have to pay. *Savair*, 414 U.S. at 274. Further, the union officials instructed employees soliciting signatures to convey this initiation fee waiver policy to their co-workers. *Id*. A number of employees testified that they signed recognition slips to avoid paying the initiation fee, which they understood to be a "fine" or "assessment." *Savair*, 414 U.S. at 274-275. The union won the election by a vote of 22-20, resulting in a Board certification. *Savair*, 414 U.S. at 270. In invalidating the certification, the Supreme Court reasoned that, "By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." *Savair*, 414 U.S. at 277. Moreover, the Court noted, "there may be some employees who would feel obligated to carry through on their stated intention to support the union. And on the facts of this case, the change of just one vote would have resulted in a 21-21 election rather than a 22-20 election." *Savair*, 414 U.S. at 278.

The closeness of the vote was also a factor in *Connecticut Health Care Partners, d/b/a Woodlands Health Center*, 325 NLRB 351 (1998), in which the Board set aside an

election on the grounds that one employee, acting as the union's "special agent" for card solicitation purposes, made an improper fee waiver statement to a co-worker. The co-worker signed a card several weeks later. *Woodlands Health Center,* 325 NLRB at 368. Noting that the proper test for the conduct of a party, or its agents, is whether it "reasonably tended to interfere with the employees' free and uncoerced choice in the election," the Board's decision to set aside the election relied heavily on the fact that a change in one vote would have changed the election's outcome. *Woodlands Health Center,* 325 NLRB at 368. However, the Board also held that an improper fee waiver offer made to an employee who had previously signed a pro-union petition did not violate *Savair*, because it "did not result in the execution of any authorization cards or membership applications, no endorsements were purchased, no false portraits of employee support could have been painted. Nor would any employees have felt formally impelled to vote for the Petitioner based on a benefit extended by the Union in connection with signing a card or joining." *Woodlands Health Center,* 325 NLRB at 367 (quoting *Dyna-Fab Corp*., 270 NLRB 394 (1984)).

In *University Towers, Inc*., 285 NLRB 199 (1987), relied on by the Employer herein,[4] the Board set aside an election on the basis of evidence that employees soliciting authorization cards on behalf of the union made improper fee waiver statements to two employees. *University Towers*, 285 NLRB at 200. In contrast with *Savair* and *Woodlands Health Center*, the Board's decision did not indicate whether any employees

[4] The Employer also cites *Gulf Caribe Maritime*, 330 NLRB 766 (2000), in which the entire bargaining unit signed union authorization cards based on (1) the union's incorrect assertion that the bargaining unit was an accretion, and (2) the union's unlawful initiation fee waiver offers. Both the authorization cards, and the Employer's consequent recognition of the union, were thus found to be tainted. *Gulf Caribe*, 330 NLRB at 767 n. 2, 772.

actually signed authorization cards to avoid paying the initiation fee. *University Towers* also differs from *Savair* and *Woodlands* in that the margin of victory (the vote tally in *University Towers* was 31 to 23) was not specifically taken into account in the Board's analysis. However, in both *Woodlands* and *University Towers,* employees soliciting union authorization cards were found to be special agents of the union, for card solicitation purposes. *University Towers, Inc*., 285 NLRB 199, 199-200 (1987)(citing *Davlan Engineering*, 283 NLRB 803 (1987)); *Woodlands Health Center*, 325 NLRB at 367.

In the instant case, the alleged threat of a $300 fine for the failure to sign an authorization card and obtain a union solidarity card, if credibly substantiated, may fall within the type of conduct prohibited by *Savair*. Alternatively, the Intervenor and its supporters may have merely informed employees that after the negotiation of a collective bargaining agreement, members of the Intervenor would have to pay an initiation fee of $100 and a strike and defense fund fee of $200, as asserted by the Intervenor. In light of the parties' conflicting versions of events, a hearing may be necessary to assess the relative credibility of the parties' witnesses. If the Employer can credibly substantiate its contentions with regard to the alleged *Savair* violation, this conduct, combined with other misconduct alleged by the Employer, may warrant setting aside the election. Inasmuch as there are substantial and material issues, including issues of fact and credibility, that would be best resolved at a hearing, I direct that a hearing be held before a hearing officer concerning Objection 1(ii). Further, I direct that a hearing be held before a hearing officer concerning Objection 2, to the extent that it refers to the conduct alleged in Objections (ii).

Objection 1(v)

In this Objection, the Employer alleges that the Intervenor, by its authorized representatives, employees and/or supporters, told employees "that by having their photographs taken and affixed to 'union solidarity' cards and by wearing the cards at work, they were already a part of the Union (thereby conveying the erroneous impression that they no longer had the right to vote 'No,' that it was 'too late' for them to change their minds, and/or that the only way for them to keep their jobs was to ensure that the Union won the election by voting 'Yes').

One bargaining unit employee is prepared to testify that approximately three weeks before the election, at an off-site informational meeting, an unnamed female organizer told her that by obtaining a "union solidarity card," she would already be "in the union." Without specifically indicating whether the organizer's statement dissuaded the witness from obtaining a union solidarity card, the Employer speculates that the organizer's statement "conveyed the erroneous impression that if she got the card, she would no longer have the right to vote 'No' and that it would be too late for her to change her mind on the day of the election."

This evidence does not have the potential to establish that "unlawful acts occurred, [and] that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Tony Scott Trucking, Inc*., 821 F.2d 312, 316 (6th Cir. 1987)(per curiam)(quoting *Golden Age Beverage Co*., 415 F.2d 26, 30 (5th Cir. 1969), *cert. den*., 484 U.S. 896 (1987)). The Employer's speculations regarding the employee's subjective reaction to the statement are irrelevant. *Picoma*

Industries, 296 NLRB 498, 499 (1989). Accordingly, it is recommended that Objection 1(v), and the corresponding portion of Objection 2, be overruled.

Objection 1(vi)

In this Objection, the Employer alleges that the Intervenor, by its authorized representatives, employees and/or supporters, "distributed a campaign flier on the day of the election bearing photocopied signatures of employees who purportedly supported the Union, and which suggested that all of these employees intended to vote 'Yes' (thereby conveying the erroneous impression that it was futile for other employees to vote 'No' even if they had not yet made up their minds on how they would vote).

In support of Objection 1(vi), the Employer expanded the scope of the objection by submitting evidence pertaining to the solicitation of signatures and the creation of the flyer, as well as its circulation.

Solicitation of Signatures

One witness would testify that on May 8, at a meeting off-site, a female organizer named "Terry" told her that if she did not sign a two-page statement, "the Union might not protect" her. Similarly, a second witness would testify that at that same meeting, on May 8, "Terry" told her that the Intervenor could "not guarantee protection" if she left the room before signing a petition. There is no evidence that either of these employees signed a petition.

The written response submitted by the Intervenor's attorney states that no meetings were held on Saturday, May 8, but that organizer Terri Harkin

> …may have spoken to workers informally on May 8 near [the Employer's facility] as part of the Union's effort to solicit worker signatures on a petition…The petition was in Spanish and English and expressed support for the Union and encouraged other workers to vote for the Union on election day, May 13…This

> petition was offered to all bargaining unit workers to sign voluntarily as a public expression of their support for the Union. [Ms. Harkin]…never said that if they did not sign, the Union could not or would not protect them.
>
> In addition, Ms. Harkin, in her meetings and discussions with workers, informed them of their right to be protected from discrimination and retaliation by the employer for their support of the Union and union activity. Ms. Harkin explained to employees that wearing a union solidarity card showing public support for the union can protect them from employer discrimination and retaliation because they will have proof of their union support.

As with Objections 1(i), (iii) and (iv), parties differ as to whether the statements attributed to Terri Harkin were objectionable threats or legitimate predictions. The determination of whether Harkin's alleged statements were threats or predictions would have to depend on an analysis of the relative credibility of the parties' witnesses. If the Employer can credibly substantiate that Harkin's alleged statements were threats, and not merely predictions, the election may have to be set aside. Inasmuch as there are substantial and materials issues, including issues of fact and credibility, that would be best resolved at a hearing, I direct that a hearing be held before a hearing officer concerning that portions of Objections 1(vi) and 2 which allege that Ms. Harkin told employees that the Intervenor might not be able to protect them if they did not sign a petition in support of the Intervenor.

Creation of flier

The Employer contends that:

> Other evidence suggests that this particular flier was fraudulently created. [One witness] would testify that she had signed a petition earlier that week on one side of the sheet, but that when she did so, her signature appeared at the top of the page, whereas Exhibit B [the flier found in the cafeteria as described above] (which [the witness] never signed) bears her signature near the bottom of the sheet. [Another witness] would testify that she, too, signed a petition approximately two weeks before the election, but that she signed it on only one side, not on two sides (as reflected by Exhibit B). [A third witness] would testify that she also signed a

petition on one side of a page that had only English words at the top of the sheet, whereas her signature appears on both sides of Exhibit B.

Significantly, all of these witnesses admit having signed a petition. The witnesses do not claim that the wording at the top of the petition they signed was materially different from Exhibit B, and they do not deny that the petition they signed was in support of the Intervenor.

Exhibit B, provided by the Employer, is a two-sided document. On each side, the document is headed by an expression of support for the Intervenor, in English on one side, and in Spanish translation on the other. Beneath the heading are at least 109 signatures. The same, identical 109 signatures appear on each side, and their placement on the page is also identical. The appearance of the petition is consistent with the Employer's allegation that the signatures were cut, pasted, and then photocopied. This would explain why one witness signed a petition at the top of the page, and yet her signature appeared further down on Exhibit B. However, there is no evidence that any of the signatures were forged.

Another witness regarding Objection 1(vi) "would testify that approximately one week before the election, as he was entering the Employer's garage to park his car, he was asked to sign a blank piece of paper that had no printing on it, and that he signed it solely to acknowledge his receipt of a union tee-shirt an employee had handed him." However, the Employer acknowledged in an electronic mail message that this witness's signature does not appear on the flier. Thus, the Employer has not shown any connection between the witness's signing of a blank piece of paper and the creation of the flier.

The Board will set an election aside "in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life Insurance Company*, 263 NLRB 127, 133 (1982). However,

merely cutting and pasting signatures to a handbill is not objectionable. *Findlay Industries*, 323 NLRB 766 (1997). The Employer has not provided evidence indicating that the leaflet was created in a fraudulent manner. Accordingly, it is recommended that the portion of Objection 1(vi) which alleges that the flier was created in a fraudulent manner, and the corresponding portion of Objection 2, be overruled.

Circulation of flier

The Employer indicated that a witness is prepared to testify that "she found the signature petition…in the employees cafeteria on the day of the election. The petition, bearing the same set of signatures on both sides (even though the caption on one side of the page was typewritten in English and on the other side was typewritten in Spanish) suggested that all of those employees—comprising more than a majority of those who were eligible to vote—intended to vote 'Yes' (thereby conveying the erroneous impression that it was futile for other eligible employees, whose signatures did not appear on the flier, to vote 'No,' even if they had not yet decided how they would vote). Notably, the witness who would testify regarding this allegation signed a petition during the week preceding the election.

The Employer's *Excelsior* list indicates that a total of 144 bargaining unit employees were eligible to vote in the election. There are at least 109 signatures on the petition, leaving a total of about 35 bargaining unit employees who did not sign the petition. At the election, 38 employees voted against the Intervenor (including, apparently, a few who signed the pro-union petition), and 101 employees voted for the Intervenor (fewer than appeared on the pro-union petition). Four ballots were voided, and only one bargaining unit employee failed to vote in the election. Thus, the numbers do

not support the Employer's argument that the 35 (or fewer) employees who did not sign the petition believed that voting against the Intervenor would be futile. Accordingly, the Employer has failed to establish that the circulation of the petition convinced employees who did not sign the petition that voting "no" in the election would be futile, as alleged by the Employer. Accordingly, it is recommended that the portion of Objection 1(vi) which alleges that the circulation of the flier was objectionable, and the corresponding portion of Objection 2, be overruled.

Objections 3 and 8

Objection 3 alleges that:

> The Union, by its authorized representatives, employees and/or supporters, interfered with the election and improperly affected the results of the election by changing its election observers during the course of each of the two polling periods, without the consent of the Employer and without good cause for doing so.

Objection 8 alleges:

> The NLRB, through its Board Agents, interfered with the election and/or failed to provide the minimum laboratory conditions necessary for a free and fair election by allowing the Union to change its election observers during the course of each of the two polling periods, without the Employer's consent and without good cause for doing so.

In support of these Objections, a witness is prepared to testify that at 8:30 a.m. on May 13, halfway through the first three-hour voting session, the Intervenor's observer was relieved by a substitute observer who had not attended the pre-election conference. At 10:00 a.m., when the first voting session ended, the Employer's attorney protested this change to the Board agents conducting the election, and advised the Intervenor that it would not consent to any such change in the Petitioner's observers during the second polling period. Despite the Employer's objections, a second witness is prepared to testify

that during the second polling period, the Intervenor's observer was relieved by another employee who had not attended the second pre-election conference.

Paragraph 5 of the Stipulated Election Agreement in this case allowed each party to "station an equal number of authorized, nonsupervisory-employees to serve as observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally." The Board has held that the breach of a provision in an election agreement providing for an equal number of observers is a material breach which warrants setting aside the election. *Browning-Ferris Industries of California, Inc*., 327 NRLB 704 (1999).

The Employer does not deny that the parties were represented by an equal number of observers throughout the election, in accordance with the terms of the Stipulated Election Agreement. Nor does it allege that any of the Intervenor's four observers committed misconduct, either while in the voting area or at any other time. The Employer presented no evidence of prejudice to the fairness of the election or to the Employer resulting from the Intervenor's use of four different observers throughout the course of the election, which consisted of two three-hour shifts. Rather, the Employer argues that "[t]he observers who left the polling area while balloting was still in progress were in the position to unfairly influence the outcome of the election." This argument is purely speculative. The Board has held that "it is not enough for the objecting party's evidence merely to imply or suggest that some form of prohibited conduct has occurred." *Cumberland Nursing & Convalescent Center*, 248 NLRB 322, 323 (1980). *Polymers, Inc*., 414 F.2d 99 (2d Cir. 1969), *cert. den*., 396 U.S. 1010, 90 S.Ct. 570 (1970)). Rather, an objecting party "must present by "specific evidence…not only that the unlawful acts

occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Tony Scott Trucking, Inc*., 821 F.2d 312, 316 (6th Cir. 1987)(per curiam)(quoting *Golden Age Beverage Co*., 415 F.2d 26, 30 (5th Cir. 1969), *cert. den*., 484 U.S. 896 (1987)). The Employer herein has failed to meet this test. Accordingly, it is recommended that Objection 3 and 8 be overruled.

Objection No. 4

This objection alleges that the Intervenor, "by its authorized representatives, employees and/or supporters, interfered with the election and improperly affected the results of the election by electioneering and/or stationing themselves in the 'no electioneering area' and/or by other electioneering while employees were in the polling room waiting to vote or were on their way into the polling room to vote."

The Employer offered to call two witnesses in support of Objection 4. One of these witnesses would testify as follows:

> [On] another occasion during the second polling period, he became aware that one or more employees were improperly standing in the hallway near the entrance to the voting room after [the Board agent] walked towards the entrance and told that employee or employees to move away, explaining to the employee or employees that they were not permitted to stand there. Because [the witness] could not see the faces of the employee or employees in question, because he/they had been standing to the side of the entrance so that those in the room could not see him/them, he is not in the position to identify the employee(s).

There is no evidence that the employee or employees standing in the hallway supported the Intervenor, or that they said or did anything while standing in the hallway, or that they failed to move away at the request of the Board agent.

The Employer's other witness regarding the electioneering allegation would testify as follows:

> [A]t approximately 9 a.m., about 10 employees walked into the voting room as a group; all of them were wearing union tee shirts and some of them were wearing "union solidarity" cards. According to [the witness], one of the employees, Ulises Moscoso, Restaurant Room Service worker, while waiving [sic] his arm, said in Spanish in front of all of the other employees, "Ladies, vote, we are going to win." Only after [the witness] asked one of the Board Agents (an African-American male) to do something about the group's conduct in the room did the Board Agent ask them to leave the room. Even though they left the room, the group continued to loiter immediately outside the voting room entrance. They moved away from the entrance only after [another] Board Agent…told them they could not stand there. [The witness] would further testify that she considered the actions of the group to be intimidating. [The witness] would further testify that approximately one half hour later, a male employee walked into the voting room, made a 'thumbs up' gesture, and said to Ms. Barahona, who was then serving as the Petitioner's observer, "We're going to win."

The Board does not set aside elections whenever electioneering takes place 'at or near the polls,' regardless of the circumstances." *Boston Insulated Wire and Cable Co.*, 259 NLRB 1118 (1982)(quoting *Claussen Baking Company*, 134 NLRB 111 (1964)). Rather, the Board determines whether the conduct, under the circumstances, 'is sufficient to warrant an inference that it interfered with the free choice of the voters.'" *Boston Insulated Wire*, 259 NLRB at 1118-1119 (quoting *Star Expansion Enterprises*, 170 NLRB 364, 365 (1968)). Factors considered by the Board in making this evaluation include "not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees…[and] whether the electioneering is conducted within a designated 'no electioneering' area or contrary to the instructions of the Board agent. *Boston Insulated Wire*, 259 NLRB at 1119 (citations omitted).

When electioneering is conducted by employees, the third-party standard applies. *Rheem Manufacturing Company*, 309 NLRB 459, 463 (1992). Prolonged, aggressive electioneering by just one or two employees may not be objectionable, even if it occurs in

or near the polling place. For example, in *Rheem Manufacturing*, an employee wearing a union T-shirt and hat "spent substantial periods of time" immediately outside the voting area, "talking to employees and loudly encouraging them to vote for the Petitioner as they entered" the voting area, and "sometimes accompanied groups of employees as they walked to the [voting area] from their departments, talking with them and otherwise shouting and encouraging them to 'vote yes.'" *Rheem*, 309 NLRB at 462. Another employee, when released with his department to vote, "began campaigning loudly for the Petitioner as his department's 60 or so employees walked to the [voting area, where he] remained outside while the other employees stood in line to enter the cafeteria, and he loudly and continually urged the employees to vote for the Petitioner." The Board concluded that this conduct was not sufficiently coercive or disruptive as to warrant setting aside the election, since at any given time there was only one employee campaigning at the entrance to the voting area. *Rheem*, 309 NLRB at 463 (distinguishing *Pepsi-Cola Bottling Co*., 291 NLRB 578 (1988)); see also *Idab, Inc*., 770 F.2d 991 (11th Cir. 1985)(evidence that employees wore pro-union paraphernalia in or near a polling area is not ordinarily sufficient to invalidate an election).

Similarly, in *Kux Manufacturing Company*, 890 F.2d 804 (6th Cir. 1989), the following incidents did not warrant setting aside the election: (1) a bargaining unit employee told a group of employees on the day of the election that he would pay them $50 a week to vote for the union, if they could prove how they voted in the secret election; (2) the same bargaining unit employee, while he and 20 other employees were in the polling area waiting to vote, "yelled two or three times that it was the employees' last chance to change their minds and vote for the union," and was told by a Board agent to be

quiet or leave, and (3) a non-bargaining unit employee went into the polling area during the election and yelled, "Vote Yes." *Kux Manufacturing*, 890 F.2d at 807, 810.

By contrast, in *Pepsi-Cola Bottling Company*, 291 NLRB 578 (1988), a group of 15 to 20 off-duty, pro-union employees formed lines on both sides of the aisleway on the way to the polling area. For the first 15 to 25 minutes of the election, they "forced all employees walking down the aisleway, including those going to vote, to walk between the lines of the union supporters and be subjected to their chants, cheers, and other antics." In these circumstances, particularly given the 50 to 49 vote tally, the Board concluded that the outcome of the election did not reflect the free choice of the employees, and set it aside. *Pepsi*, 291 NLRB at 578, 579.

In the instant case, two employees are each alleged to have made a single pro-union comment while in the voting area, addressed to a group of pro-union employees in one instance, and to the Intervenor's observer in the other. Notably, the group of pro-union employees obeyed the instructions of the Board agent when asked to leave the polling area and the area outside the polling area. *See Boston Insulated Wire*, 259 NLRB at 1119. This conduct is not comparable to the prolonged, coercive electioneering that occurred in *Pepsi-Cola Bottling*, *supra*, in which employees were forced to run a "gauntlet" of raucous pro-union employees on their way to the voting area. Another distinguishing factor is that in *Pepsi-Cola Bottling*, the Board stressed the union's narrow margin of victory. Moreover, the electioneering which occurred in the instant case was not nearly as prolonged or aggressive as the electioneering found not objectionable in *Rheem Manufacturing, supra*, conducted by two employees immediately outside the voting area, or the electioneering found not objectionable in *Kux Manufacturing, supra,*

conducted by two employees within the voting area itself. Even if one witness was "intimidated" by the electioneering which occurred in the instant case, subjective reactions are not considered by the Board in evaluating whether conduct is objectionable. *Petrochem Insulation, Inc.*, 341 NLRB No. 60 (2004). Further, wearing pro-union paraphernalia, alone, is not objectionable. *Idab, Inc*., 770 F.2d 991 (11th Cir. 1985).

Based on the foregoing analysis, it is recommended that Objection 4 be overruled.

Objections 5 and 6

In Objection 5, the Employer alleges that the Intervenor, "by its authorized representatives, employees and/or supporters, interfered with the election and improperly affected the results of the election by having pro-Union employees wearing Union tee-shirts escort other employees into the polling room and by waiting until those employees had finished voting, thereby intimidating and coercing the escorted employees into voting 'Yes.'"

Objection 6 alleges that the Intervenor, "by its authorized representatives, employees and/or supporters, interfered with the election and improperly affected the results of the election by intimidating employees on their way to, and before they reached, the polling room to vote."

In support of these objections, the Employer would call one witness, to testify that he saw another employee (not the witness) being "escorted":

> [D]uring the course of the [second] polling period, two employees wearing union shirts escorted…a Kitchen Warewasher, to the voting room entrance, spoke with him in a low voice and then watched from the entrance as [the voter] nervously entered the voting room to cast his ballot. According to [the witness], when he brought this incident to the attention of [the] Board Agent…[the latter] informed [the witness] that she found nothing wrong with what the two escort employees had done.

In *Westwood Horizons Hotel*, 270 NLRB 802 (1984), the Board set aside an election based on evidence that pro-union employees threatened to "beat up" three individuals if they did not vote for the union, as well as any other employee in the bargaining unit who did not vote for the union. Subsequently, on the day of the election, two of the individuals who had been threatened were brought to the polling place by force, and threats of force, by the pro-union employees. *Westwood Horizons*, 270 NLRB at 802-803. This conduct was witnessed by numerous employees, and widely disseminated. *Id.*

By contrast, in the instant case, the Employer did not provide evidence as to what the pro-union employees said to the voter when "speaking in a low voice." It did not furnish evidence that the pro-union employees made threatening gestures or physically touched the voter, or that they intimidated or coerced him in any way. It is well-settled that merely "transporting voters to the polls is not objectionable, unless accompanied by other conduct clearly prejudicial to the freedom of the employees to choose their bargaining representative by secret ballot." *Gastonia Combed Yarn Corporation and Thread and Processing Departments of Jewel Cotton Mills, Inc.*, 109 NLRB 585, 587 (1954). The Board has held that "it is not enough for the objecting party's evidence merely to imply or suggest that some form of prohibited conduct has occurred." *Cumberland Nursing & Convalescent Center*, 248 NLRB 322, 323 (1980). Because the Employer has failed to establish a *prima facie* case of objectionable conduct in connection with Objections 5 and 6, it is recommended that these objections be overruled.

Objection 7

Objection 7 pertains to my Order dated May 4, attached hereto as Exhibit 1, in which the undersigned granted the Petitioner's request to withdraw from the ballot, and

ordered that the election be conducted according to the terms of the Stipulated Election Agreement, with the Intervenor alone on the ballot. Objection 7 is set forth verbatim below:

> The NLRB's Regional Director for Region 29 interfered with the integrity of the election by issuing an Order dated May 4, 2004, over the Employer's objections, granting the request of Local 108, Retail, Wholesale and Department Store Union, UFCW, AFL-CIO ("the Petitioner") to withdraw from the ballot**,** and directing that the election scheduled for May 13, 2004, be conducted according to the terms of the Stipulated Election Agreement already agreed upon by the Employer and the Intervenor, with the Intervenor alone on the ballot. The Regional Director's Order improperly issued *after* (i) Region 29 had issued a Notice of Election containing a sample ballot advising employees that they would have the opportunity to select, on the day of the election, from the Petitioner, the Union, or "Neither," (ii) the Employer, as requested by Region 29, had prominently posted several copies of that Notice of Election and sample ballot in its workplace, and (iii) the Employer, in reliance on the Stipulated Election Agreement, had conducted a lawful pre-election campaign for several weeks advising employees to vote "Neither" on the day of the election if they did not wish to be represented by any labor organization. The decision of the Regional Director created confusion over the choice employees would have to make when they voted as well as over the substance of the question they would be asked on the ballot, thereby compromising the integrity of the election results.

In support of this objection, the Employer did not offer to provide testimony of voters who were allegedly confused regarding the choice they would have to make when they voted, or the substance of the question they would be asked when they voted.

Rather, the Employer would offer the testimony of one witness, its Manager of Human Resources, who would testify that on an unspecified date, she posted the original set of Notices enclosed with the Regional Director's letter to the parties dated April 29, 2004. These Notices contained a sample ballot providing a choice between the Petitioner, the Intervenor, and "Neither." The witness would further testify that late on Sunday, May 9, 2004 (three full days prior to the election), the first set of Notices was removed and

replaced with the second set of Notices, containing just two choices on the sample ballot: the Intervenor and "No."

In my Order dated May 4, attached hereto as Exhibit 1, I granted the Petitioner's request to withdraw from the ballot, and ordered that the election be conducted according to the terms of the Stipulated Election Agreement, with the Intervenor alone on the ballot. As discussed in greater detail in the May 4 Order, Section 11098 of the NLRB Representation Casehandling Manual provides, in pertinent part:

> In a multiple-union situation, the election agreement provides that:
>
> "If more than one union is to appear on the ballot, any union may have its name removed from the ballot by the approval of the Regional Director of a timely request, in writing, to that effect."

Accordingly, as set forth in the May 4 Order, Paragraph 11 of the Stipulated Election Agreement executed by the Employer provides that if more than one labor organization is on the ballot, any labor organization may have its name removed by the approval of the Regional Director of a timely written request. The Employer has failed to make an affirmative showing of "unusual circumstances" justifying its withdrawal from this provision of the Stipulated Election Agreement it executed, as required by Section 11097 of the NLRB Representation Casehandling Manual. The May 4 Order further relies on 11112.1(b) of the NLRB Representation Casehandling Manual, which provides, in pertinent part:

> Where a petitioning union seeks to withdraw the petition after the approval of an election agreement, and there is an intervening union that desires the election to be held or an appropriate decision be issued, the latter must submit a petitioner's showing of interest in the unit involved. Upon proper submission by the Intervenor, the petitioner may be dropped from the ballot (but see Sec. 11098), with prejudice applied (Sec. 11118) and the election, with the intervenor alone on the ballot, should be held in accordance with the agreement.

Pursuant to Sections 11112.1(b) and 11098 of the NLRB Representation Casehandling Manual, the Intervenor established at least a 30% showing of interest to warrant the further processing of the petition. Accordingly, the May 4 Order concluded that the foregoing provisions of the Casehandling Manual required that the Petitioner be dropped from the ballot and that the election, with the Intervenor alone on the ballot, should be held on May 13, 2004, as scheduled.

In support of Objection 7, the Employer provided a copy of a letter to the Region from its attorney, dated May 3, 2004, arguing that the Petitioner should not be permitted to withdraw its petition. In the May 3 letter, the Employer speculated that, "Permitting wholesale changes to the ballot's language just 10 days before the election could lead to a significant number of defaced or otherwise void ballots, based on the voters' inability to register their true intent as a result of their confusion." However, the Tally of Ballots reveals that there were no void ballots.

The May 3 letter cites numerous cases, none of which is pertinent to the running of the election in the instant case, in accordance with the Stipulated Election Agreement, with the Intervenor's name alone on the ballot pursuant to the Petitioner's request to withdraw from the ballot. For example, the Employer relies on *Sunnyvale Medical Center, Inc*., 241 NLRB 1156 (1979), for the proposition that an affirmative showing of "unusual circumstances" must be made before a party may withdraw from a Stipulated Election Agreement. *Sunnyvale*, 241 NLRB at 1156, 1157, 1158 n. 5. However, this "unusual circumstances" requirement does not apply to requests to withdraw from the *ballot*, as occurred in the instant case. The "unusual circumstances" language is found in

Section 11097[5] of the NLRB Representation Casehandling Manual, pertaining to requests to withdraw from election agreements. By contrast, Section 11098 of the Representation Casehandling Manual, pertaining to requests to withdraw from the ballot after an election agreement is approved, does not require a showing of "unusual circumstances." Rather, Section 11098 provides that "in a multiunion situation, if any of the unions wishes to withdraw from the ballot and allow the election to go forward, such a request may be freely approved if time permits."

First FM Joint Ventures, LLC d/b/a Hampton Inn & Suites-Chicago River North, 331 NLRB 238 (2000), also relied on by the Employer herein, is inapposite for the same reasons, inasmuch as it, too, involves an employer's request to withdraw from a Stipulated Election Agreement. In denying the employer's request, and effectuating the Stipulated Election Agreement, the Board emphasized its policy of "honor[ing] concessions made in the interest of expeditious handling of representation cases, even if the Board may have reached a different result upon litigation." *Hampton Inn*, 331 NLRB at 238 (citing *Highlands Regional Medical Center*, 327 NLRB 1049). In the instant case, by contrast, the Petitioner's request to withdraw its name from the ballot did not vitiate the Stipulated Election Agreement, delay the election, or necessitate an evidentiary hearing.

The Employer also cites *Unifemme, Inc*., 226 NLRB 607 (1976), wherein the 8th Circuit denied enforcement, holding that the employer's request to withdraw from the Stipulated Election Agreement should have been granted, because a second labor organization intervened in the proceedings after the stipulation had been executed. *Unifemme, Inc*., 570 F.2d 230 (1987).

[5] Formerly Section 11098, at the time of the *Sunnyvale* decision.

Several additional cases cited by the Employer are similarly inapposite, in that they involve requests to withdraw petitions, rather than requests to withdraw from the ballot. In *Carpenter Baking Company, Inc*., 112 NLRB 288 (1955), the Board granted the petitioner's request to withdraw from the election, while denying its motion to withdraw its petition. *Carpenter*, 112 NLRB at 289. In *Anheuser-Busch, Inc*., 246 NLRB 29 (1979), the petitioner's request to withdraw its petition was denied, because an intervenor possessing a petitioner's showing of interest wished to proceed to an election. *Anheuser-Busch,* 246 NLRB at 30. However, since the petition was dismissed for other reasons, specifically, the inappropriateness of the petitioned-for bargaining unit, *Anheuser-Busch,* 246 NLRB at 32, the Board did not specifically address the issue of whether it would permit the petitioner to withdraw its name from the ballot, as occurred in the instant case. By contrast, in *Weather Vane Outwear Corporation, Inc*., 233 NLRB 414 (1977), also cited by the Employer herein, the Regional Director and Board *granted* a petitioner's request to withdraw a representation petition, which had no affect on the viability of a separate decertification petition, found to be timely filed because it was filed during the pendency of the representation petition that was later withdrawn. *Weather Vane,* 233 NLRB at 415.

In several of the cases cited in the Employer's May 3 letter, the Board refused to defer to Article XX or other no-raid agreements, because "to do so would permit a private resolution of a representation question in a manner contrary to the policies of the Act and would impinge upon the Board's exclusive jurisdiction to resolve such questions of representation." *Anheuser-Busch,* 246 NLRB at 30; *Weather Vane,* 233 NLRB at 415 (quoting *Cadmium & Nickel Plating Division of Great Lakes Industries, Inc*., 124 NLRB

353 (1957)); *see also Jackson Engineering*, 265 NLRB 1688, 1699-1701 (1959), *enf'd, Local 1814, International Longshoremen's Association, AFL-CIO,* 735 F.2d 1384 (D.C. Cir. 1984), *cert. den*., 469 U.S. 1072 (1984)(Board denied charging party's "request," compelled by an Article XX decision, to withdraw serious unfair labor practice charges).

Based on these cases, the Employer argued in its May 3 letter, "To the extent that Petitioner's withdrawal request was involuntarily triggered by 'no raiding' proceedings under the AFL-CIO constitution, the Board does not permit the withdrawal of the petition." However, the Employer has not submitted evidence that the Petitioner's withdrawal was triggered by Article XX or any other no-raiding provision. At the time of the withdrawal of the instant petition, the Petitioner, although asked, did not provide a reason for the withdrawal. The Employer, noting that, "Petitioner's offices are located in New Jersey, and…it apparently does not represent hotel workers in New York City," opined that "the Intervenor only got involved when it appeared that the Petitioner was encroaching on [its] jurisdiction." These observations are purely speculative.

Because the arguments, case law, and evidence supplied by the Employer fail to establish that the Petitioner's withdrawal from the ballot interfered with the voters' exercise of free choice, it is recommended that Objection 7 be overruled.

Objection 9

In this objection, the Employer alleges that "The NLRB, through its Board Agents, interfered with the election and/or failed to provide the minimum laboratory conditions necessary for a free and fair election by failing to prevent improper electioneering and acts of intimidation in and/or near the polling room during the course of the election. The Employer did not present any evidence in support of this objection that was not

considered in connection with Objections 4 through 6. Accordingly, I recommend that Objection 9 be overruled.

Objection 10

Objection 10 alleges that, "The conduct set forth in Objections 7, 8 and 9 impugned the NLRB's integrity, impartiality and neutrality in the eyes of the voters and the parties to the election and further gave the appearance that the NLRB favored or endorsed the Union in the election." The Employer did not present any evidence in support of this objection that was not considered in connection with Objections 7, 8 and 9. Accordingly, I recommend that Objection 10 be overruled.

Objections 11, 12 and 13

These objections allege as follows:

> Alternatively, if any of the acts set forth above are not attributable to the Union but rather were engaged in by employees or individuals as third parties, said employees and individuals were acting on behalf of the Union, and their third party conduct was sufficient to, and in fact did, either singularly or cumulatively destroy the minimum laboratory conditions necessary for a free and fair election.
>
> A general atmosphere of confusion, fear and/or coercion created by the Union and/or third parties during the critical period before the election interfered with the employees' ability to exercise a free, unfettered and uncoerced choice in the election and interfered with the conduct of the election.
>
> The Union, by its authorized representatives, employees and/or supporters, and/or the NLRB engaged in additional improper and/or objectionable conduct which interfered with the election and tainted the minimum laboratory conditions necessary for the rendering of a free and fair election.

The Employer did not present any evidence in support of these objections that was not considered in connection with Objections 1 through 10. Accordingly, I recommend that Objections 11 through 13 be overruled.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held concerning Objections 1(i through iv), and the portion of Objection 1(vi) that alleges or implies that the Intervenor threatened employees when soliciting signatures on a petition, as well as the portions of Objection 2 that pertain to these portions of Objection 1. Further, I have recommended that Objection 1(v), the portion of Objection 1(vi) that alleges that a flyer was fraudulently created, the portion of 1(vi) that alleges that the circulation of the flyer was objectionable, the portions of Objection 2 that pertain to the aforesaid portions of Objection 1, and Objections 3 through 13, be overruled.

Accordingly, pursuant to the authority vested in the undersigned Regional Director by the National Labor Relations Board, herein called the Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by Objections 1(i through iv), and the portion of Objection 1(vi) that alleges that the Intervenor threatened employees when soliciting signatures on a petition, as well as the portions of Objection 2 that pertain to these portions of Objection 1, as described above.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file with the Board, an original and seven copies of Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof, together with a copy

of any brief filed, upon the other parties. A statement of service shall be made to the Board simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that on July 8, 2004, and on consecutive days thereafter until concluded, at One MetroTech Center North, 10th Floor, Brooklyn, New York, a hearing will be conducted before a hearing officer of the National Labor Relations Board on the issues set forth in the above Report, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

RIGHT TO FILE EXCEPTIONS

Under the provisions of Section 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Exceptions must be received by the Board in Washington, D.C. on or before July 15, 2004.[6]

Signed July 1, 2004, at Brooklyn, NY.

_____

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

[6] Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and which are not included in the Regional Director's Report are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Regional Director's Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.